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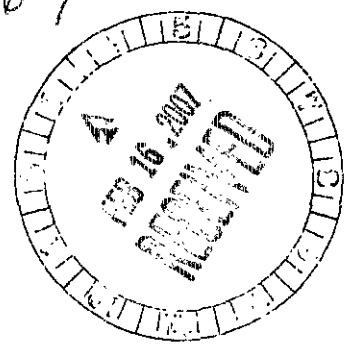


U.S. DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

GOVERNMENT OF THE TERRITORY
OF GUAM,

Complainant,

Vs. STB Docket NO. WCC-101

AMERICAN PRESIDENT LINES, LTD.,
MATSON NAVIGATION COMPANY,
And SL SERVICE, INC. F/k/a SEA-
LAND SERVICE, INC. and K/a
HORIZON LINES, LLC

Respondents.

PETITION FOR RECONSIDERATION
AND FOR CLARIFICATION OF INTERVENOR
CARIBBEAN SHIPPERS ASSOCIATION, INC.

COMES NOW, Intervenor Caribbean Shippers Association ("CSA"), by and through its counsel and submits this Petition For Reconsideration and Clarification of the decision of the Surface Transportation Board (the "Board") dated February 1, 2007 and served February 2, 2007 (hereinafter the "February 2nd Order"). Intervenor states as follows:

Introduction And Background of The Proceeding

The CSA sought and was permitted to intervene in the above captioned proceeding based upon the belief that whatever reasonable rate analysis was ultimately adopted by the Board would in all likelihood be applied in all of the non-contiguous domestic offshore trades. The original complaint, filed in September 1998, mirrored a complaint by the Government of Guam ("GovGuam") that was filed on December 7, 1989 at the Federal Maritime Commission. ("FMC"). The STB complaint referenced a June 1, 1998

decision in the FMC proceeding in *The Government of the Territory of Guam et al. v. Sea-Land Service, Inc. and American President Lines, LTD.*, Docket No. 89-26.

The proceedings at the FMC were protracted and a final decision in that case was not issued until early July 2005. The final decision denied reparations to the Government of Guam even though it had been established that the defendants' overall rate structures resulted in excess profits to the carriers. The reparations remedy/methodology sought by GovGuam in FMC Docket No. 89-26 was determined to be deficient in that excessive carrier profits could not be equated to excessive individual rates.[1] GovGuam expended approximately Fifteen Million ($15,000,000.00) and 16 years of litigation to reach the involved result.

The CSA sought intervention in Docket WCC-101 as it has been the legal precedent/requirements under the Interstate Commerce Act that a rate complaint identify particular rates[2]. CSA was of the belief that GovGuam would in fact identify the particular rates to be reviewed. GovGuam, in its subsequent filings, however has taken the position that it is challenging all of the rates in defendants' tariffs and defining its complaint as an "aggregate rates" complaint case. Whether GovGuam's approach is "wise or folly" is not for the CSA to decide. However, it is clear that Intervenor's concerns regarding the Board utilizing Docket No. WCC-101 as a vehicle for "industry-wide" application had a substantial basis. The Board dismissed a portion of an amended

[1] See Attachment A to Intervenor's Comments in Response of the Government of the Territory of Guam to the Order of the Surface Transportation Board To Show Cause, dated July 7, 2005, at page 2, 53-54, 129-131 (FMC Order of June 1, 1998).

[2] This factual situation excludes ICC style Ex Parte General Rate Increase and Investigation proceedings wherein the burden of proof as to the reasonableness of a proposed rate(s) was with the carriers. The last rate protest filed at the ICC in the domestic offshore trades involved Puerto Rico. In that case, Chief Judge Paul Cross ordered the Puerto Rico Manufacturers Association to identify the particular rates that were the subject of the PRMA complaint. The PRMA then dismissed the complaint rather than identify the particular rates.

complaint in the Hawaii Trade based upon the representation that the Board was developing individual commodity rate reasonableness standards in Docket No. WCC-101.[3]

The February 2nd Order

The February 2nd Order reflects a wholesale adoption of railroad rate analysis by the Board. The value or merits of Constrained Market Pricing ("CMP") as applicable to water carrier service in the non-contiguous domestic offshore trades remain to be determined. It cannot be disputed that all shippers in these offshore trades are in fact "captive shippers"—either of one defendant or the other defendant carrier.[4] The primary functional purpose of CMP pricing is to provide a carrier with the ability to engage in differential pricing while purportedly protecting the captive shipper. Differential Pricing is irrelevant to the domestic offshore trades due to the simple fact that these trades are at best oligopolies and in fact, classic parallel pricing. Defendants acknowledge the sharing of the same vessels—the exact 'status' of these capacity rationalization arrangements remains in dispute. The lack of true competition and competitive alternatives to Defendants' services render a primary objective and benefit of CMP (differential pricing to capture revenue/costs from 'competitive non-captive traffic') nugatory. The carriers' sponsorship of a "new" domestic trade market study simply underscores the defendants' concerns regarding the level of carrier competition. Guam is some 6,500 nautical miles from the west coast United States. Defendants in April 2002 openly represented their

[3] See; DHX v. Matson Navigation et al., STB Docket NO. WCC-105, Order dated May 9, 2003, served May 14, 2003, at page 8, footnote 10.
[4] The ICC defined a "captive shipper" as follows: "A shipper is said to be captive to a particular rail carrier if that carrier has market dominance over the transportation movements at issue". Cf. Coal Rate Guidelines, Nationwide, 1 ICC2d. 521, 553 (1985).

joint service undertaking. What was not said by the defendants was the removal and reduction of vessel capacity that occurred co-existensive with their 'joint service'.

(I)
THE BOARD ERRED IN ITS INTERPRETATION OF THE ZORF

The CSA remains concerned regarding the ruling of the Board in regard to Part IV of the Order "Zone of Reasonableness" (Order at pages 12-13). It is the position of the CSA that the Board erred in its analysis and application of Section 13701(d)(1), 49 U.S.C.

The CSA by this Petition is seeking both correction and clarification of the Board's interpretation of the Zone of Rate Reasonableness. The Order identifies the rates subject to the ZORF as "proposed rate(s)". This language is consistent with the prior application of ZORF as applied by the Interstate Commerce Commission. See; *Ex Parte No. MC-169, Expansion Of Zone Of Reasonableness For Motor Common Carriers Of Property and Freight Forwarders*, 367 I.C.C. 907, 909-910 (1984); *Ex Parte No. MC-169 (Sub-No. 1) Automatic Expansion Of Zone Of Rate Freedom For Motor Common Carriers Of Property and Freight Forwarders*, 3 I.C.C.2d. 40, 45 (1986) citing 49 U.S.C. 10708(d)(3)(B).

The Zone of Rate Freedom contained in the ICC Termination Act of 1995 is a **PARTIAL** carry-over from Section 10708(d)(1), (d)(2) and (d)(3) of the Motor Carrier Act of 1980 and Bus Act of 1982. The particular language, which matches the "proposed rate" language in the present section 13701(d)(1), is:

> "(d)(1) Notwithstanding any other provision of this title (49 USC 1 et seq) the Commission may not investigate, suspend, revise, or revoke any rate **proposed** by a motor common carrier of property ..." (10708(d)(1), 1986 Supp.)

Sections 10708(d)(3)(A) and 10708(d)(3)(B) contain the same "proposed rate" limitation and qualification language.

The authority of the Interstate Commerce Commission to automatically expand the ZORF under the Motor Carrier Act under 10708(d)(2) (...the Commission, by rule, may expand the percentages specified in paragraph (1)(B) of this subsection) was not carried forward and made part of the ICC Termination Act of 1995.

The language employed by the Board in its "Board Analysis" (Order at page 13) appears to suggest that the Board has interpreted Section 13701(d)(1) of the ICC Termination Act as including the power to establish an "automatic expansion" of the ZORF provided only for a "proposed rate" to create a safe harbor for Defendants' "base rates". A base rate is a pre-existing effective rate that was in existence one-year before the proposed rate was submitted and the barometer by which the "percentage increase or decrease" was to be determined. Cf. 3 I..C.C.2d. at 47-48. The Board no longer has the statutory power to expand the ZORF.

The Board rationalization regarding the "knowledge of the carriers" that their aggregate rates might be order to be reduced—cannot be sustained in view of the findings of the FMC in its Order on June 1, 1998. Attached hereto are Appendix 9 and 10 to the FMC June 1, 1998 Order as further attached to the September 1998 STB GovGuam Complaint. The defendants were most certainly on notice that their rates were too high and that appropriate remedies were being sought.

The Board may not recognize that its interpretation of Section 13701(d)(1) simply eviscerates GovGuam's damage claims[5]. The application of the cumulative effect of the potential ZORF on the rates is as follows: (1996 – rate at 100) applying the compound effect of a 7.5% increase to January 2007 equals a 121% increase BEFORE it can be

[5] The CSA may not agree with the approach taken by GovGuam in this proceeding—BUT CSA does take serious objection to the undermining of GovGuam's case through misinterpretation of a statute that has no application to the rate tariffs in dispute. Base rates, not proposed rates, are being litigated.

established that a rate is potentially unreasonable. A carrier may defeat a shipper rate reasonableness complaint by simply delaying disposition of the proceedings until the ZORF eliminates the claim.

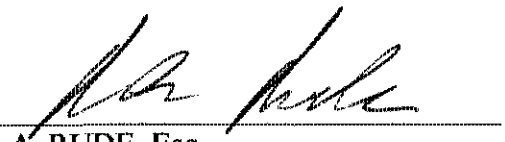
Section 115.3(b)(2) permits reconsideration when the Board's prior action involved material error. It is a fundamental rule of statutory interpretation that the PLAIN LANGUAGE of a statute controls its interpretation. (Prong 1 of *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-844 (1984). The interpretation of Section 13701(d)(1), 49 U.S.C. (2006 Supp.) applies only to "proposed" rates is supported by the legislative history of the section. See; Conf. Report, No. 104-422, 104th Cong. 1st Sess. at page 205, wherein it is make plain that the ICCTA ZORF applies to "proposed rate(s)". Any attempt by the Board to interpret the statute to apply to "base rates" as is apparently being suggested in the February 2nd Order is inappropriate. Cf. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)(the intention of the drafters must be controlling). The Board must interpret Section 13701(d)(1) to give effect to the "proposed rate" qualification. Cf. *International Joint Through Rates*, 1 I.C.C. 2d. 978, 980-81 (1985).

CONCLUSION AND REQUEST FOR RELIEF

Intervenor hereby requests that the Board review, reconsider and clarify its February 2, 2007 Order to the extent that Order would permit the use of Section 13701(d)(1)—ZORF to apply or be applied to any rates that have already gone into effect and therefore part and parcel of defendants' base rates. Secondly, that the Board clarify that section 13701(d)(1) does not create any safe harbor in regard to a base rate nor that the ZORF for proposed rates be utilized or be applied in such a manner as to retroactively protect the

reasonableness of a prior established and effective rate. Further, for such other and relief as the Board deems appropriate in the circumstances.

Respectfully submitted,



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Counsel For Intervenor
Caribbean Shippers Association, Inc.

Dated: 16 February 2007

Certificate of Service

I hereby certify that a copy of this document has been served, by first class mail, postage prepaid, upon all parties of record in this proceeding.

Dated this 16th day of February 2007 at Falls Church, Virginia 22046.

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APPENDIX 9 AND 10 TO FMC DECISION IN DOCKET NO. 89-26, JUNE 1, 1998

Appendix 9: Rate of Return for Sea-Land

1988

Line	Exhibit	Item	Sea-Land	Hahne	FMC Decision
10	B	Net Income and Interest Expense	9,132,817	6,892,000	6,892,000
11	A	Total Rate Base	27,521,239	19,377,000	19,377,000
12		Rate of Return on rate base	33.18	35.57	35.57
1989					
10	B	Net Income and Interest Expense *	2,596,000	5,495,000	2,747,000
11	A	Total Rate Base	12,291,000	11,042,000	11,042,000
12		Rate of Return on rate base	21.12	49.76	24.88

* note: Hahne doubled Sea-Land's Net Income and Interest Expense from Exhibit 2, 1989.

Appendix 9: Rate of Return for APL
(in thousands of dollars)

Line	Exhibit	Item	APL (G.O. 11)	Nadel (GovGuam)	Kolbe (APL)	FMC Decision
1988						
10	B	Net Income and Interest Expense	2,089	11,486	4,673	7,746
11	A	Total Rate Base	28,089	16,626	28,830	21,216
12		Rate of Return on rate base (%)	7.44	69.08	16.21	36.51
1989						
10	B	Net Income and Interest Expense	2,934	14,274	4,325	9,994
11	A	Total Rate Base	49,540	29,489	55,836	35,550
12		Rate of Return on rate base (%)	5.92	48.40	7.75	28.11
1990						
10	B	Net Income and Interest Expense	1,446	15,067	3,115	10,316
11	A	Total Rate Base	53,964	35,075	57,708	41,368
12		Rate of Return on rate base (%)	2.68	42.96	5.40	24.94

Appendix 10: Sea-Land's Excess Return Earned in the Guam Trade

Allowable rate of return

	Rate Base	ROR	Allowable Return
1988	$19,377,000	11.06	$2,143,096
1989	$11,042,000	5.60	$1,221,245

Excess Revenue

	Allowable Return	Actual Return	Excess Return
1988	$2,143,096	$6,892,000	$4,748,904
1989	$1,221,245	$2,747,000	$1,525,755
Total			$6,274,659

Appendix 10: APL's Excess Return Earned in the Guam Trade

Allowable rate of return

	Rate Base	ROR	Allowable Return
1988	$21,216,000	11.06	$2,346,490
1989	$35,549,502	11.60	$4,123,742
1990	$41,367,876	11.73	$4,852,452

Excess Revenue

	Allowable Return	Actual Return	Excess Return
1988	$2,346,490	$7,745,885	$5,399,395
1989	$4,123,742	$9,993,748	$5,870,005
1990	$4,852,452	$10,316,280	$5,463,828
Total			$16,733,229